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October 6, 2021

Hon. Robert W. Lehrburger
United States Magistrate Judge
United States District Court for the Southern District of New York
500 Pearl Street
New York, NY 10007-1272

Re: Diana Martinez v. United States of America
19 CV 5582 (RWL)

Honorable Sir:

I represent the plaintiff in the above medical malpractice matter before the Court. I send this letter pursuant to your Honor's rule I(F) requesting a modification of Docket Entry # 27 and seeking an extension of time to complete all discovery. This application is made with the consent of the AUSA representing the defendant herein.

While Plaintiff and the US Attorney's Office were able to exchange documentary discovery and amicably resolve disputes regarding the discovery process, most of the health care providers with knowledge of the issues herein are defendants in the related State Action but are non-parties in this matter before this Honorable Court.

Despite this Honorable Court Ordering Joint Discovery (Docket Entry # 27), the State Court having issued a discovery order on August 17, 2021 (**Exhibit A**), plaintiff serving subpoenas on the federal non-party witnesses for this action (**Exhibit B**), plaintiff sending numerous emails (over 14) and making telephone calls (**Exhibit C**) attempting to amicably resolve these issues, offering the State Court defendants to stipulate to join both cases in the Southern District of New York and give up a jury in Bronx

County, and a letter to this Honorable Court (**Docket Entry # 32**), the State Court defendants have failed to produce any documentary discovery or appear for depositions.

On March 29, 2021, your Honor extended the exchange of documentary discovery to May 27, 2021 and fact/party depositions to be completed by July 27, 2021 [there are numerous health care providers to be deposed and a number of attorneys], and for permission to have, if necessary, more than 7 hours per witness. Expert discovery to be completed by October 1, 2021, and their depositions to be completed by December 1, 2021. (Docket Entry # 27).

Discovery in the related State matter has come to a halt because of a pending motion by counsel for some defendants seeking dismissal as to those defendants because of the Federal action¹. Until that motion is resolved, the State Court action has halted [See, CPLR § 3214(b) staying all discovery]. Adding insult to injury, because of the pandemic, the State Court in the Bronx has issued an Administrative Order effectively cancelling all discovery conferences (**Exhibit D**). Indeed, the next discovery conference in the State matter is currently scheduled for December 15, 2021 (*if then*). (See **Exhibit E**).

In the August 16, 2021 update Plaintiff's Counsel provided to this Honorable Court, it was noted discovery in the State Matter had been delayed not only because of COVID related issues disrupting the State Court's so-Ordering the Joint Pre-Trial Orders issued by this Honorable Court, but also because of a motion to dismiss made by one of Defense Counsel whose clients had all been removed from the State matter and were now being representing by the US Attorney's Office. (Docket # 32). As part of the update,

¹ As this Honorable Court is aware, the State Court action had been removed to Federal Court last year and was remanded to State Court when those named defendants whom the US Attorney's Office identified as Federal Employees were dismissed from the state action. The attorney bringing the motion had represented those defendants plus one other defendant. Plaintiff's opposition to the motion pending in New York Supreme Court notes that counsel has no standing to bring the motion because he no longer represents the defendants in question. (**Exhibit F**).

a request had been made to hold a joint teleconference between the Federal and State Court parties in an attempt to keep the discovery process on track. (Docket Entry #32)

While this Honorable Court, on August 20, 2021, denied the request for the joint conference as moot², the Court did rule that “Non-parties to this proceeding will need to comply with valid and properly served subpoenas”. Unfortunately, they have failed to comply with these subpoenas, and plaintiff’s request for a conference was denied as moot.

Plaintiff has filed a motion in the State Court action to compel Defendants to proceed with discovery or be sanctioned. (**Exhibit G**).

Prior requests have been made for extensions of the deadline for parties to complete discovery. Good cause has existed for each and every request, and we respectfully submit good cause exists herein. Despite plaintiff exercising due diligence during a pandemic³, we have been unable to get the defendants to depose the plaintiff and for them to appear for their depositions and produce all documentary discovery.

Good cause exists for the current request for an extension of time to complete discovery. Plaintiff has taken multiple good faith affirmative steps to move discovery forward, but these steps have been unsuccessful. Plaintiff subpoenaed medical facilities and doctors to produce documents and testify in this matter, but the subpoenaed parties have violated

Plaintiff remains ready, willing, and able to proceed with discovery, but Defendants in the State Court action have failed to do so. Plaintiff should not be punished because of defendants’ refusal to proceed.

² Shortly before this Honorable Court issued this ruling, the Bronx Supreme Court issued a Preliminary Conference Order that adopted by reference this Court’s Joint Pre-Trial Order. (**Exhibit A**)

³ My office has suffered repeated closures due to COVID infections/exposures; just today an employee was sent home because he learned that his young daughter and wife had COVID. Each time this occurs, work is disrupted and interrupted.

In addition to the State Court Defendants' non-compliance with Court Ordered discovery, my Covid induced short-staffed firm inadvertently calendared the incorrect date for the close of fact discovery. Due to the Covid-19 pandemic, our firm has been operating with a skeleton crew and trying to handle all matters in the best way possible. Unfortunately, the dates of your last Order were not entered in our diary, thereby delaying this letter.

Accordingly, the plaintiff would respectfully request this Honorable Court to modify and extend the deadlines for fact discovery, expert discovery, and schedule a conference to discuss the discovery status between Plaintiff and the US Attorney's Office, with all relevant parties to the State Court case invited to attend so discovery can proceed/be completed in a timely manner.

Respectfully submitted,

Robert J. Genis

CC: The Honorable Joseph Capella, Justice for the Bronx County Supreme Court (via NYSCEF)
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